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Supreme Court, U.S.
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No. 94-759

In The

Supreme Court of the United States

October Term, 1994

RICHARD E. JOB,

Petitioner,

vs.

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION RESTATED

California law firmly establishes that a standard loan guaranty provision by which the guarantor grants the lender the guarantor's advance consent to changes in the terms of the underlying loan, including changes in loan disbursement procedures, is valid and fully enforceable.

The question is whether, despite existing California law, application of the advance consent provision in Petitioner's continuing guaranty to changes in the loan disbursement procedure and margin requirements rendered that provision what Petitioner calls a "de facto cognovit" and deprived him of his constitutional right to due process, even though Petitioner was given a full trial on the matter.

RESPONDENT'S RULE 29.1 STATEMENT

Respondent Wells Fargo Bank, National Association, has the following affiliations:

Subsidiaries

American Securities Company
ATC Realty Eight, Inc.
ATC Realty Nine, Inc.
ATC Realty Eleven, Inc.
ATC Realty Fifteen, Inc.
ATC Realty Sixteen, Inc.
ATC Realty Seventeen, Inc.
Garces Water Company, Inc.
Crocker Properties, Inc.
Wells Fargo Leasing Corporation
Wells Fargo Lease Mortgage Capital Partners
Wells Fargo Petrolease, Inc.
Wells Fargo Investment Advisors
Wells Fargo Institutional Trust Company, N.A.
Wells Fargo Foreign Funds Advisors
Wells Fargo Securities Inc.
Wells Fargo International Affiliates Corporation
Wells Fargo Foreign Funds Management, S.A.
Wells Fargo International Limited
Wells Fargo Limited
Collin Equities, Inc.
Wells Fargo Real Estate Group
Wells Fargo Realty Advisors Funding, Inc.
Wells Fargo Realty Finance Corporation
Wells Fargo Housing Advisors, Inc.

RESPONDENT'S RULE 29.1 STATEMENT – Continued

Parent

Wells Fargo & Company

Affiliates

Crocker Life Insurance Company
Wells Fargo, Ltd.
Montgomery Estates, Inc.
Wells Fargo Corporate Services, Inc.
Wells Fargo Credit Corporation
Wells Fargo Insurance Services
Wells Fargo Nikko Investment Advisors International
Wells Fargo Nikko Investment Advisors Limited
Wells Fargo Nikko Investment Advisors Canada Limited
Wells Fargo Nikko Investment Advisors Japan Limited
Wells Fargo Financing Corporation
WFC Management Corporation
Wells Fargo Corporation (an Oregon Corporation)
Central Pacific Corporation

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Respondent Wells Fargo Bank, National Association, ("Wells Fargo") respectfully requests that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

1. A Brief Introduction

This matter involves two contracting parties: Petitioner, Richard E. Job ("Job"), a guarantor of a loan to his cattle business, and Respondent, Wells Fargo, the lender to Job's cattle business.[1] In the state court below, these parties litigated numerous state contract and tort law issues concerning their respective rights against and obligations owing each other. Both lower courts, trial and appellate, carefully analyzed the many issues before them and rejected all of Petitioner's arguments against the enforceability of his Continuing Guaranty, in light of the express terms of his agreement with Wells Fargo and the numerous California decisions that uphold the validity of *identical* contractual provisions. The lower courts found no basis under state law for any tort claims by Job. They further found under state law that the implied contractual duties Job claimed Wells Fargo owed him were inconsistent with the clear and unequivocal express provisions of his contract with Wells Fargo.

[1] Since this action began in November, 1983, Job has been represented continuously by Los Angeles attorney Eugene J. Albertini of Albertini & Gill. His petition here is the first time that Job has appeared *in propria persona*.

The court of appeal also rejected one additional argument, Job's "de facto cognovit" argument. It rejected that theory because (1) unlike the due process issues raised in true cognovit cases, Job had a full trial in court, and (2) Job could cite no support, case, statutory or otherwise, for his "de facto" theory.

Job's arguments plainly illustrate that the enforceability of his guaranty is purely a matter of state law. He complains not of whether or not he had his day in court, but of the contract interpretation and guaranty waiver law applied by the California courts. These are matters of state law.

Job presents no *bona fide* federal constitutional question.

2. Background Facts

That Job does not present a question suitable for review by this Court should be apparent without resort to the extensive facts underlying this action. Wells Fargo thus briefly recounts background facts, pointing out Job's misstatements and substantial omissions of facts, as required by Supreme Court Rule 15.1. The California Court of Appeal's opinion (reprinted in Petitioner's Appendix) provides a more comprehensive statement of the facts. Some facts appear in the later sections of this brief, as appropriate.

Job and his son-in-law, Jay Williams, owned a cattle-raising business named J/W Cattle, Inc. (55% for Job – 45% for Williams). Job sued Wells Fargo to escape liability under a Continuing Guaranty ("Guaranty") and a Third

Party Pledge Agreement that he gave Wells Fargo to support a commercial loan he procured to finance J/W Cattle, Inc. Wells Fargo cross-complained against Job for money due under his Guaranty.

Job's account of facts ignores the extent of his involvement in J/W Cattle, Inc. and his promises to Wells Fargo to be involved actively in his business. Job was an officer, director, and 55% shareholder of J/W Cattle, Inc. Job knew that Wells Fargo had one unsatisfactory experience with Williams, and he orally promised Wells Fargo that he would be involved in the business and personally would monitor his son-in-law's performance.

Job *in his Guaranty* warranted that he had the means and accepted responsibility for keeping informed of J/W Cattle, Inc.'s condition, and agreed that Wells Fargo had no obligation to disclose any information it received about J/W Cattle, Inc. (thus discrediting Job's statement at page 20 that Wells Fargo was "the only one in a position to see that this [Williams' misuse of funds] was occurring"). Job also in his Guaranty gave his advance consent to any changes in the terms of the underlying indebtedness (as between J/W Cattle, Inc. and Wells Fargo) and waived any defense by reason of such change. The Guaranty contained other consent and waiver provisions as well, whereby Job agreed to the holding or release of security by Wells Fargo and the waiver of any right to require that the Bank deal with any collateral in a particular manner, and waived any defense arising by reason of J/W Cattle's application of loan proceeds for

unintended purposes.[2] Job's Guaranty did not, as Job claims (Petition, p. 23), contain the provisions of the Credit Agreement. The Credit Agreement was a separate contract between Wells Fargo and the borrower, J/W Cattle, Inc.; it did not incorporate any term of Job's Guaranty and the Guaranty did not incorporate any term of the Credit Agreement.[3]

After discovery of a shortfall due to intentional wrongdoing by Williams, Job refused to honor his Guaranty. Job claimed that the Bank had disbursed loan funds improperly, that the Bank owed him numerous duties in connection with the loan, that the Bank breached those duties, and that the waiver and consent provisions in his Guaranty should not be enforced.[4]

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[2] These provisions are set forth in full at pages 43-47 of the Court of Appeal's decision, an appendix to Job's Petition.

[3] In fact, as noted above, the Guaranty contained an express provision that permitted J/W Cattle and Wells Fargo to change the terms of the loan without further consent of Job as guarantor. Thus, pursuant to his undertaking in the Guaranty, Job needed to keep himself adequately informed of the facts, events or circumstances that might affect his risk. And Job's means of keeping so informed could not include any reliance on Wells Fargo to keep him informed because he expressly contractually agreed in the Guaranty that Wells Fargo had "no obligation to disclose such information or material to" him.

[4] Job's professed reliance "on the expertise of Williams *and the Respondent* to make the venture a success" (Petition, p. 9, emphasis added) is refuted and rendered entirely unreasonable by the obligations he promised the Bank he would undertake and his agreement that Wells Fargo assumed no responsibility other than to perform its written contractual obligations in connection with the loan. Indeed, the trial court summarily adjudicated Job's cause of action for tortious breach of the implied

The trial court and the court of appeal decided that Job was bound by express terms of his contracts and that Wells Fargo did not owe him the duties he asserted, absent from the Guaranty and for the most part contradicted by it. The courts relied on well-established legal principles that (1) the implied covenant of good faith will not import into a contract a term that directly conflicts with an express contractual provision (*see Carma Developers (California), Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342 (1992)); (2) tort duties will not be implied into a contract absent special circumstances not present here (*see Harris v. Atlantic Richfield Co.*, 14 Cal.App.4th 70 (1993)); and (3) waiver and advance consent provisions, such as existed in Job's Guaranty, are valid and enforceable (*see American Security Bank v. Clarno*, 151 Cal.App.3d 874 (1984) and *Stevenson v. Oceanic Bank*, 223 Cal.App.3d 306 (1990)).

Job argues here that the advance consent provision in his Guaranty, by which the "terms of J/W's Indebtedness" to Wells Fargo could be changed at any time without further notice to him, should not have been enforced with respect to the changes in the authorization mechanism for loan advances on J/W Cattle, Inc.'s credit line and in loan margin requirements because it had the effect

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covenant of good faith against him because there was no "special relationship" between Job and Wells Fargo. *See* Job's Appendix, pp. 15-16, 82, n.10.

of depriving him of what he calls his due process right to a "meaningful defense". (Petition, p. 23)[5]

REASONS TO DENY THE WRIT

1. This Case Does Not Meet the Rule 10.1(a) Criteria for Review

None of the criteria for granting review specified in Rule 10.1 exists here. *The law is uniform; there is no conflict.* All California cases that have considered the validity of guaranty provisions similar or identical to Petitioner's advance consent provision have upheld them. *See e.g., Stevenson v. Oceanic Bank,* 223 Cal.App.3d 1607 (1990); *American Security Bank v. Clarno, supra,* 151 Cal.App.3d 874 (1984); *Bloom v. Bender, supra,* 48 Cal.2d 793 (1957); *Katz v. Haskell,* 196 Cal.App.2d 144 (1961); *Southern Cal. First Nat'l Bank v. Olsen,* 41 Cal.App.3d 234 (1974); *State Board of Equalization v. Carlton,* 223 Cal.App.3d 1607 (1990); and *United States v. Grayson,* 879 F.2d 620 (9th Cir.

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[5] Job also mentions a purported duty on Wells Fargo's part to inventory the cattle. (Petition, p. 10). Job lost that argument because he did not plead it, and because he expressly waived "any benefit of, or right to participate in any security whatsoever now or hereafter held by Bank," and authorized Wells Fargo, without further notice to Job, to "take and hold security for the payment of this Guaranty or the Indebtedness guaranteed, and exchange, enforce, waive and release any such security." *See* Job's Appendix, pp. 115-123. The Guaranty provision that Job complains about here – his advance consent to changes in the terms of the borrower's indebtedness – was not relevant to the elimination of the inventory issue.

1989). The *Stevenson* Court held that an identical advance consent provision encompassed the loan disbursement procedure in that case, *exactly* as the state courts did here. Job's argument that the word "Indebtedness" in that guaranty provision should have been narrowly defined to exclude loan disbursement procedures flatly contradicts the law of *Stevenson* and finds no support in any other decision.

Job cites no authority for his interpretation of the guaranty provision as a "de facto cognovit" that "effectively" deprived him of due process, despite the extensive trial and appellate court proceedings that took place in this case. Furthermore, Job cites no authority to support his contention that he was denied due process under the 14th Amendment by the state courts' interpretation of the meaning and validity of the waiver clauses in his Guaranty. No important – indeed, no *bona fide* – question of federal law is presented.

2. The Loan Disbursement and Margin Requirement Issues Left the Case for Independent and Adequate Reasons Under State Law

Job's "federal question" should not be considered because the dual authorization issue and in loan margin requirement issue were resolved against Job for independent and adequate reasons under state law. Job's counsel dropped the loan disbursement authorization (or dual authorization) issue from the case because he did not state facts raising or otherwise presenting the claim in his opening statement at trial. The margin requirement issue

was eliminated for two reasons – one of which was that Job *did not plead it*.

When the court trial commenced on Job's declaratory relief cause of action (with a jury phase to follow on Wells Fargo's cross-complaint), the issue whether Wells Fargo made loan disbursements with appropriate authorization remained in the case. The court had overruled Wells Fargo's motion *in limine* directed to that dual authorization issue, although it threw out Job's claim that disbursements required two *signatures* because the credit agreement allowed for "oral or written" authorization.[6]

Job's counsel gave his opening statement which concentrated on all the claims the court had ruled out during the *in limine* process, and ignored the earlier made contention that the loan disbursements lacked adequate authorization because both Job and Williams had not given oral or written authorization for the advances. The trial court granted Wells Fargo's nonsuit motions on Job's previously rejected claims. *It also granted a nonsuit* on the issue whether there were *any unauthorized loan advances*. That issue encompassed the question of whether Wells Fargo's alleged failure to follow the dual authorization procedure with the borrower exonerated Job. The court granted the motion because Job's opening statement did

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[6] Job incorrectly states that Wells Fargo argued and the trial court "found that there had been no dual authorization requirement in the loan to begin with" (Petition, pp. 11, 19). Neither Wells Fargo nor the trial court ever denied that a dual authorization procedure existed at the outset of the loan. *See* Job's Appendix, p. 49.

not raise facts or argue about improper fund disbursement arising from lack of dual authorization.

Job's counsel did not seek to reopen his opening statement and raise the disbursement authorization issue. Additionally, on appeal Job never challenged the trial court's ruling on the motion for nonsuit. Instead, after several attempts to make an offer of proof on other matters, Job dismissed his complaint. That dismissal was with prejudice under California Code of Civil Procedure section 581(e), since trial had commenced and Job neither sought nor made any attempt to show good cause for dismissal without prejudice.

Accordingly, under California procedure, the issue whether loan advances were authorized left the case due to the omissions in Job's opening statement that he chose not to correct. In effect, Job eliminated the issue of whether the advance consent to changes in terms in his guaranty was valid by eliminating the issue as to whether or not the disbursements were properly made as between J/W Cattle, Inc. and Wells Fargo in such a way to excuse Job from liability on his guaranty.

The issue regarding margin requirements was eliminated not only because of the Guaranty's express provisions, but for the independent reason that *Job did not plead it*. *See* Job's Appendix, pp. 122-123, and n.18.

Therefore, the judgment rests on independent and adequate state grounds, and there is no basis for review by this Court. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

3. Neither Job's Advance Consent to Changes in Loan Terms, Nor Any Other Provision in His Guaranty Deprived Job of His Constitutional Right to Due Process

Petitioner argues that the trial court and court of appeal interpreted a standard advance consent provision in his continuing guaranty in such a way as to render such clause "a de facto cognovit clause" (Petition, p. 12), i.e., "a confession to judgment in effect, if not in fact" (Petition, p. 47). Job submits that this "de facto cognovit clause" deprived him of his constitutional right to due process, a right which he misinterprets as one that entitles him to "a meaningful defense." (Petition, pp. 12-13.)

Due process requires " 'the opportunity to be heard.' [Citation.] It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1964). A cognovit is a confession of judgment whereby a party waives his or her constitutional right to notice and the opportunity to be heard. *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 184-188 (1972).

Job concedes that "[t]here was obviously no cognovit, no confession to judgment, involved here, as that term is usually understood," and that "there was undeniably a judicial proceeding involved in reaching the judgment and Job clearly had notice of it". (Petition, p. 47). The Court of Appeal, in rejecting Job's "de facto cognovit" theory, stated it plainly and simply: "Job was given notice and a hearing. The continuing guaranty was not a cognovit agreement depriving Job of property without due process." (Job's Appendix, p. 69.)

Job's due process right to be heard was satisfied. Procedural due process does not entitle Job to a "meaningful defense" by changing or ignoring the substantive provisions of his Guaranty, particularly in light of the substantial body of case law, cited above, upholding identical or similar provisions.[7] Indeed, *Stevenson v. Oceanic Bank, supra,* involved not only an identical loan provision, but closely similar facts, and upheld application of the provision to changes in loan disbursement procedures, just as the trial court and court of appeal did here. Job's argument that *Stevenson* is "bad law" (Petition, p. 17) has no place before this Court, nor do any of his arguments about how the Credit Agreement and his Guaranty should have been interpreted under California law. (*See* Petition, pp. 21-40.) All of those arguments were made in the state courts, and rejected by those courts as unsound.[8]

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[7] There can be no right to "a meaningful defense" if the facts and the law do not give rise to one. Plainly, there can be indefensible cases with nary a hint of a constitutional issue. This is such a case. Many litigants choose to settle such cases. Job chose to litigate.

[8] Straying from his "federal question", Job argues at length as he did in his Petition for Review before California Supreme Court that the advance consent provision in his Guaranty is not enforceable because his Guaranty and the Credit agreement between Wells Fargo and J/W Cattle, Inc. were really the "same contract". His argument is based on irrelevant case law and a misinterpretation of California Civil Code section 1642 which provides only that a court faced with a question of contract interpretation should look to related agreements for aid in construing the contract in question; Section 1642 does not require merger of contracts. Job's "same contract" argument, as he admits (Petition, p.33), "runs afoul" of *Stevenson v. Oceanic Bank, supra,* wherein the court rejected the argument that a loan

That Job now does not like either the terms of his Guaranty or California law which upholds the validity of such terms does not create a due process violation. Interpretation of the Guaranty terms are entirely matters of state law. As noted by this Court in *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 474 (1988): "[I]nterpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." Job makes no showing to take this case out of the general rule.

CONCLUSION

Job cannot here complain that he lacked the opportunity to be heard and assert his defenses. *He started the lawsuit* by filing a complaint aimed at escaping his obligations under his Guaranty. He brought a summary judgment motion that was considered and denied. He successfully fended-off two summary judgment motions by Wells Fargo (except as to one issue not raised here). His case went to trial. A California intermediate court of appeal considered his appeal and ruled against him. Throughout the proceedings he had every opportunity to make his arguments. He has no viable due process complaint.

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disbursement procedure set forth in the Credit Agreement between the borrower corporation and the Bank was a part of the Guaranty Agreement between the Guarantor, who, just as here, was a principal of the borrower corporation, and the bank.

Job's arguments against the enforceability of the express terms of his agreements with Wells Fargo raise only contract and tort issues that were exclusively within the province of the state courts to decide.

The Petition should be denied.

Respectfully submitted,

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